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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 386

IN THE MATTER

of

HULON CAPSHAW, an Attorney,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK, AND BRIEF IN SUPPORT THEREOF

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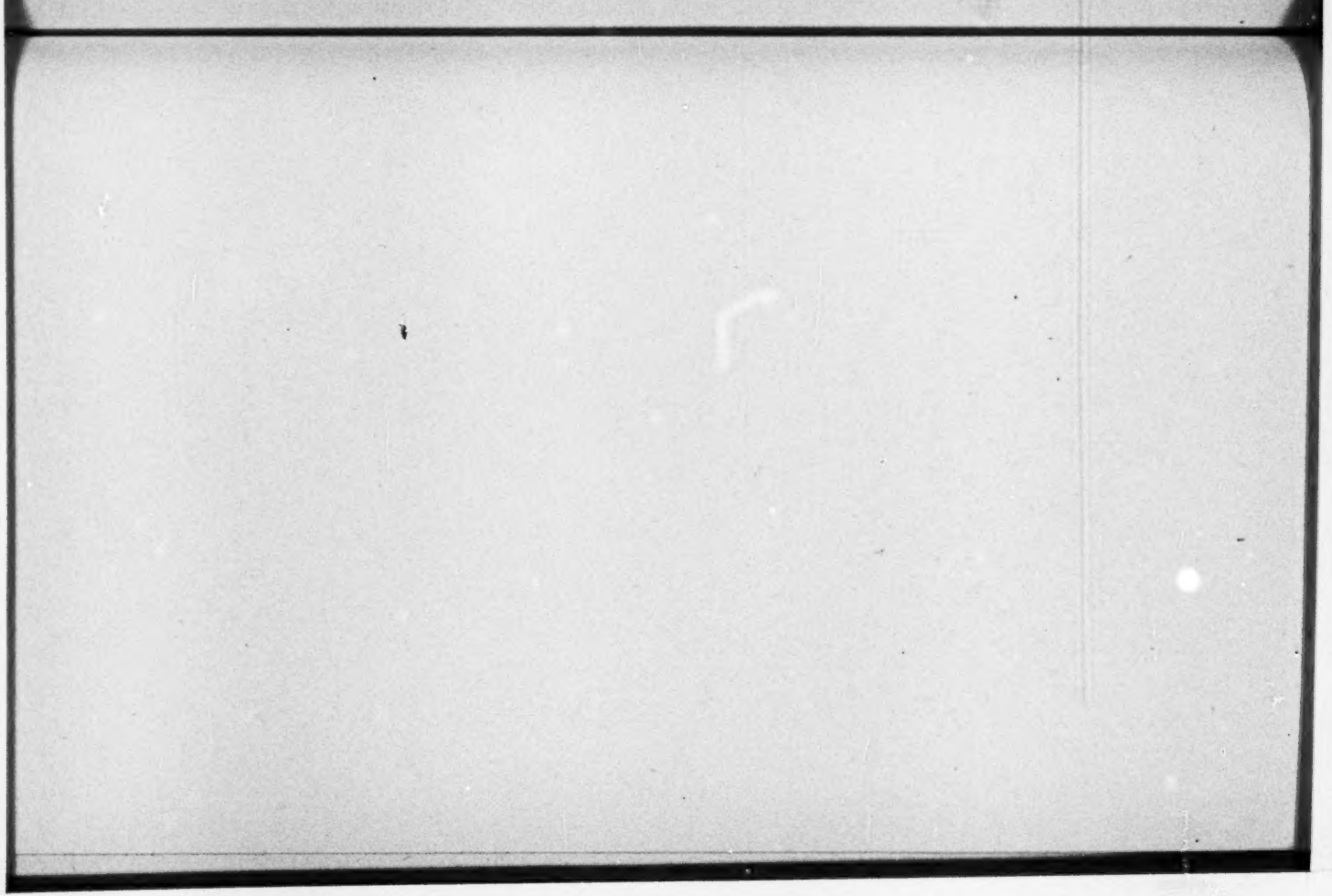

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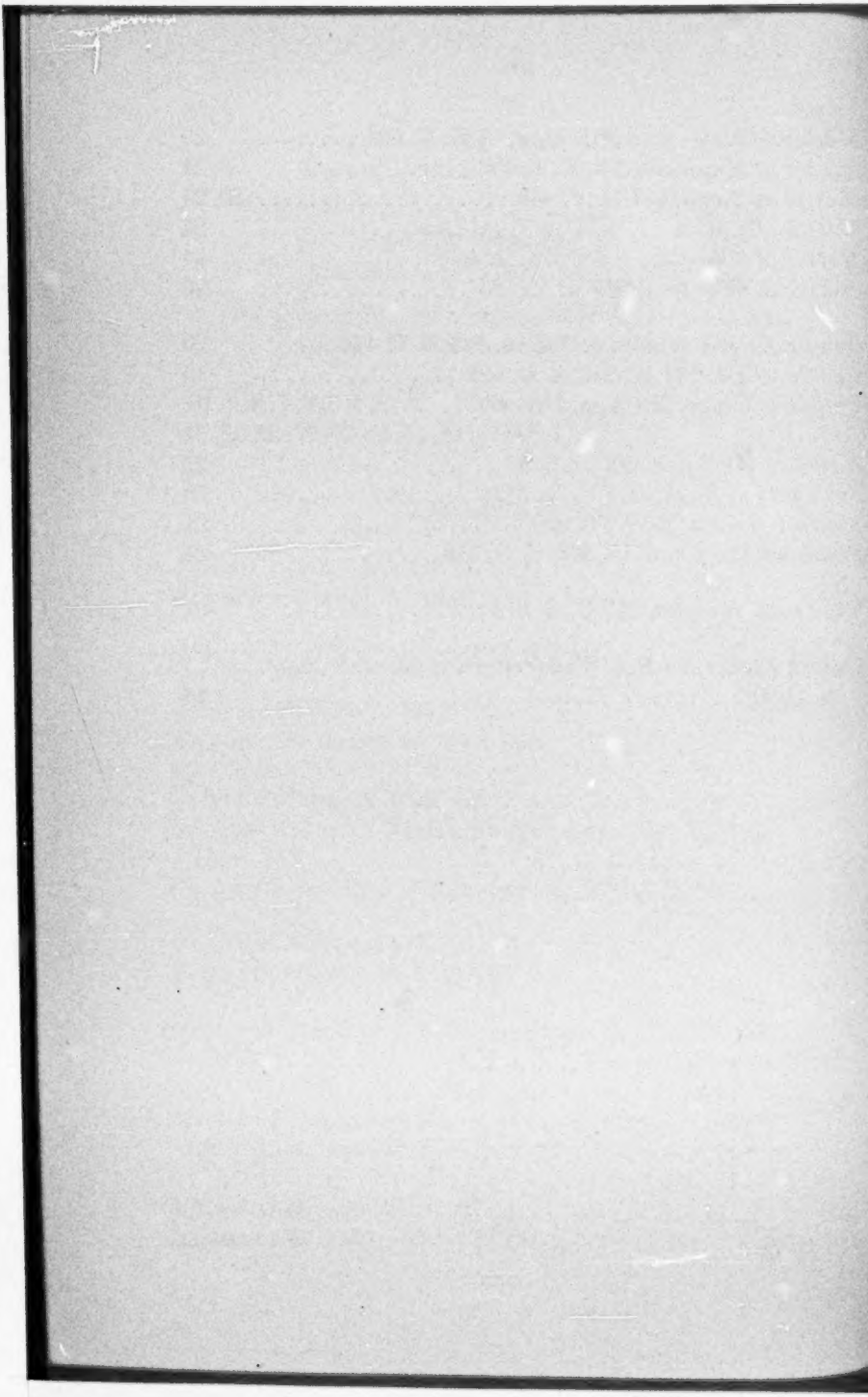

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To

THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Hulon Capshaw, prays that pursuant to section 237 (b) of the Judicial Code, amended, a Writ of Certiorari issue to the Court of Appeals of the State of New York to review its final decision and order made in the above entitled proceeding on May 25, 1944, affirming the disbarment of petitioner by the Appellate Division, First Department.

Opinions Below

The opinions of the Appellate Division in the disbarment case are reported in 266 App. Div. 345-346; (R. 691-3). The Court of Appeals' affirmance was without opinion (292 N. Y. 687). A prior opinion by the Appellate Division in

a case for petitioner's removal as a magistrate, from which the facts for the disbarment decision were adopted by the same Justices, is reported in 258 App. Div. 470. The Court of Appeals denied a review of the latter decision for lack of jurisdiction, N. Y. Law Journal, April 17, 1940, p. 1739.

Summary Statement

Petitioner has been disbarred without due process of law and in denial of his right to an equal protection of the laws, on charges based upon perjured testimony (given in a case wherein he was not a party) of which he had no notice or opportunity to meet.

Jurisdiction

Due process of law under the Fourteenth Amendment of the United States Constitution has been denied petitioner in a judicial determination depriving him of the right to earn his living only upon the testimony given by two self-confessed criminals in a case wherein petitioner was not a party (*People* v. *Hines et al.*, 258 App. Div. 466*) and wherein he was unable and has had no opportunity at any time to cross-examine them. Their testimony is not a part of the record of the disbarment hearings held by a referee appointed by the Appellate Division, but nevertheless was considered by the Appellate Division without notice to petitioner, and was in fact the basis of its decision disbarring him.

The right of a person to work and earn a living in any occupation or profession can only be taken from him according to due process of law, irrespective of what the occupation or profession may be. The fact that the profession happens to be that of an attorney does not deprive him of "the common rights and ordinary privileges of the citi-

* Hereinafter referred to as the *Hines* case and is fully discussed at pages 10 et seq.

zen". (*Matter of Eldridge*, 82 N. Y. 161, 168). An attorney in New York State can only be disbarred as the result of a court proceeding conducted in accordance with common-law rules of evidence. (*Matter of Kaufman*, 245 N. Y. 423.) In such a case he is entitled to notice of the "specific charges and opportunity to make specific answers to them, an opportunity to cross-examine the witnesses in support of them, and an opportunity for argument upon the law and facts". (*Garfield* v. *U. S. ex rel, Spalding* 32 App. D. C. 153, 158; cited with approval in *Goldsmith* v. *Board of Tax Appeals*, 270 U. S. 117, 123.)

The testimony of these two witnesses in the *Hines* case was expressly excluded from each record in the two cases subsequently brought against petitioner. The first case was for petitioner's removal as a City Magistrate. The referee appointed by the Appellate Division in that case expressly excluded their testimony in presenting the charges to that court. The second case, for his disbarment, was before the same Justices whose referee held the only hearings therein and expressly excluded their testimony from that record (R. 73-74).

However, the Appellate Division in rendering its decision in the removal case disregarded the report of the referee therein and expressly relied on the testimony of these two witnesses in the *Hines* case, as is shown by quotations and summations of their testimony and references to newspaper stories of the political-criminal *Hines* case, in its decision, as will hereinafter (at pages 6-9) be pointed out. The removal decision was rendered by the same Justices, with one exception, who were considering the *Hines* record on appeal and rendered their decision therein and in the removal case on the same day.

The Appellate Division's decision in the disbarment case adopts the facts "stated in detail" in the removal opinion based on "the same evidence" and fails to consider petitioner's evidence in the disbarment proceeding (R. 692). Thus, without notice, without opportunity at any time to

cross-examine these two witnesses or to answer the additional charges found by the Appellate Division solely from their testimony and without a hearing thereon, petitioner has been disbarred without evidence to support any of the charges against him.

The decisions against petitioner violate the Fourteenth Amendment of the United States Constitution in invidiously denying him the equal protection of the New York rules of law requiring notice of the specific charges for disbarment, a fair trial and an opportunity to cross-examine the witnesses against him, heretofore enforced in favor of other attorneys in like circumstances, involved in the same kind of court proceedings to determine like rights, but leave unchanged the rules as to such future litigants.

Perjured testimony of the two witnesses, known to the State to be such, which had been excluded from evidence, was used after the hearings had closed without notice to petitioner as the basis of the Appellate Division's conclusions against him. There was no other testimony or legal evidence against him. The right to the assistance of counsel as to this perjured testimony and to the additional charges drawn therefrom, criminal if true, was invidiously denied him.

These Federal Constitutional questions were duly raised at petitioner's first opportunity, to wit: on the appeal to the Court of Appeals by argument and in the briefs which are presented herewith as detached exhibits: A—Brief, pp. 14-16, 73-79; B—Reply Brief, pp. 2-4. The Court of Appeals must necessarily have decided these Federal questions in rendering its decision and entering its order of affirmance without opinion. No remedy through further State court proceedings is available. Jurisdiction of this Court is invoked upon the grounds that Federal questions of substance have been decided contrary to applicable decisions of this Court.

The Charges for Disbarment

The only charges for disbarment of which petitioner was given notice were, in substance, that while he was acting as a New York City Magistrate he erroneously decided two cases which came before him (December, 1932; May, 1933) and in doing so acted in violation of his duties and his decisions were actuated by unworthy and illegal motives and for considerations outside of the evidence presented before him; that while testifying with relation to his decisions in the two cases at the Hines-Schultz conspiracy trial (February 15-17, 1939) he made contradictory, evasive and unfounded statements and attempted to obstruct the administration of justice by deceiving and misleading the jury as to the evidence presented and the law which should have been applied in the two decisions and his real reasons for the same; and that his acts of misconduct in his judicial capacity for which he had been removed from office as a Magistrate showed a lack of the necessary character and fitness to entitle him to practice his profession and constituted a proper basis for a disciplinary proceeding (R. 11-14).

No witness was called and no testimony against him was received to prove any of these charges. They are untrue, and are unsupported by any legal evidence. None of them would have been found, as the conclusions of the Appellate Division show, but for its consideration of the testimony of the two witnesses and other charges, far graver, outside the record (R. 19-20, 23-26; 258 A. D. 470).

ADDITIONAL CHARGES OF WHICH NO NOTICE OR OPPORTUNITY TO ANSWER WAS GIVEN

When considering the case, which had been submitted to a referee, the Appellate Division, without any notice or opportunity to object, also considered the testimony (which is dehors the record) of two witnesses from the record of another case (the political-criminal *Hines* case). Neither of these witnesses, nor any other witness, had been called to testify in the proceeding against the petitioner. No opportunity had been allowed petitioner at any time to cross-examine them. Only the testimony of one of them, Weinberg, had been offered in evidence in the disbarment proceeding and had been expressly excluded by the referee. The petitioner was not a party to the *Hines* case (only having been a witness) was not represented by counsel therein, and had none of the rights of a party.

The conclusions reached by the Appellate Division against petitioner are so permeated and dominated by references to the testimony of these two witnesses, by newspaper stories, and far graver charges, all dehors the record, that it is manifest they controlled its conclusions upon the charges actually preferred.

The additional charges, libelous and continuously damaging to petitioner's reputation and earning power, are in substance that:

(1) Petitioner "aided" and was "implicated" as one of the "so-called benefactors" of the Hines-"Dutch" Schultz policy conspirators and racketeers (opinion, 258 App. Div., 470, 480);

(2) The political leader Hines could "dominate" and "control" petitioner's decisions as a Magistrate and "have cases disposed of favorably" in his court (Id. p. 471):

(3) "The power of Hines was invoked" and "again called into action" in petitioner's decisions in the two pol-

icy cases (Id. p. 480), and "the circumstances disclosed" under which the two cases had come before him (Id. p. 479);

(4) When the petitioner took the witness stand in the *Hines* case "he did so *with full knowledge** of the fact that several of the principals * * * had made *complete confessions* and had *divulged the minute details* of the numbers racket as operated by 'Dutch' Schultz" (Id. p. 480);

(5) Petitioner attempted to "bring about the acquittal of Hines" (Id. p. 479) and to "establish the innocence of Hines" (Id. p. 484).

No notice had been given of these additional charges, which in effect made petitioner a party to the Hines-Schultz conspiracy; nor had any opportunity been permitted him to answer them by pleading and proof or to cross-examine the witnesses on whose testimony the Appellate Division solely relied for finding them true. That Court frankly stated that its conclusions were "after careful examination of the testimony in the *Hines*" case (Id. p. 485).

These additional charges are adopted as grounds for the disbarment by the Appellate Division's statement "the facts involved are stated in detail in the (removal) opinion of this court in *Matter of Capshaw* (258 App. Div. 470)" and the disbarment is on "the same evidence which had been submitted" for petitioner's removal as a Magistrate (R. 692). These quoted statements are the only pronouncements of the court as to the grounds for the disbarment. Ordinarily no formal findings are made in a New York disbarment proceeding, but the opinion must be looked into for the actual conclusions upon which the order is based. In this case the conclusions on which the disbarment order is based are not elsewhere to be found except in the removal opinion (258 A. D. 470); and since the court says in effect go there for them, it becomes necessary to look there in order

* Italics wherever used herein are ours.

to ascertain on what the charges for disbarment were sustained.

The removal decision (258 A. D. 470) had not been reviewed. The Court of Appeals had denied petitioner's application for a review because of its lack of jurisdiction, citing *Matter of Droege* (197 N. Y. 44). In the latter case it had held that the removal of a Magistrate is not a court proceeding but analogous to a removal by an executive officer. The Court said (p. 50):

> "How is this case any different because the governmental agency through which certain removals from office may be effected, happens to be the Appellate Division of the Supreme Court instead of the Governor or the Lieutenant-Governor?"

The Appellate Division in the disbarment proceeding against petitioner does not expressly hold that the removal opinion (258 A. D. 470) is a court decision, sui generis, or that it is res judicata or upon any theory has any probative force or evidentiary value in the disbarment proceeding which could be applicable to future litigants, but simply adopts the facts "stated in detail" therein (R. 692).

The decisions against petitioner at the same time invidiously violate the well-settled New York rule that no other proceeding may be res judicata or have any force or effect in a disbarment proceeding, but that a lawyer can be disbarred only through a court action begun ab initio with notice of the specific charges and a fair trial conducted in accordance with the common-law rules of evidence.

That this well-settled rule was to govern in this case was the understanding of the parties on either side is shown by the conduct of the hearings and the rulings of the referee. Petitioner's attorney objected to the introduction in evidence of testimony in the *Hines* case, saying:

> "No opportunity was ever given for confrontation or cross-examination. * * * That evidence would clearly be inadmissible" (R. 73-74).

To which the prosecution attorney replied:

> "I am not pressing it, Judge, in view of the objection" (R. 74).

The objection was sustained. Theretofore the latter attorney had said to the Referee:

> "That testimony is not in this case. The Hines case is not in this case, only the respondent's own testimony" (R. 29).

Since the referee expressly excluded the *Hines* case testimony and petitioner was thereby led to understand that it would not be considered under his "answer denying all the charges" (referee's report R. 687) neither the Referee nor the Appellate Division could without notice thereafter consider it without violating petitioner's right to a fair trial.

Without any notice to the petitioner, however, the Appellate Division, when it came to consider the case on the referee's report, made no findings of fact other than to state in its opinion that the facts "are stated in detail in the opinion of this court in *Matter of Capshaw* (258 App. Div. 470)" and that he is disbarred on "the same evidence which had been submitted" for his removal as a Magistrate (R. 692), thereby incorporating by reference its findings of the additional charges in the removal action (258 A. D. 470) based on the testimony of the witnesses in the *Hines* case. Petitioner had had no notice in the removal action of the additional charges nor opportunity to cross-examine the witnesses in the *Hines* case. The referee in the removal action had also expressly excluded in presenting the charges to the Appellate Division all the testimony in the *Hines* case except that given by the petitioner in which he had consistently denied all the charges against him.

A Brief Resumé of the Case

On August 2, 1938, without warning the name of petitioner, a New York City Magistrate, appeared in front-page headlines all over the country as having been named by the District Attorney in a bill of particulars in the *Hines-Schultz* conspiracy case. He, with a deceased Magistrate and an ex-District Attorney, was charged with having been "bribed, intimidated or influenced" to protect the political-criminal Hines-Schultz mob in the policy racket. He knew that he was innocent, but could obtain no information as to the charges, since he was not made a party, except what he read in the newspapers (R. 586, 36, 39).

On the same day the Chief Magistrate gave a letter to the press addressed to petitioner "relieving" him of his court duties. The letter failed to state that only the Appellate Division could "remove" a Magistrate and that no hearing or investigation as to the charges had been made (R. 316).

Petitioner had to await the Hines trial to learn from the sensational testimony of two confessed felons that he was accused of having been influenced by Hines in two Magistrate Court cases, the titles of which he then learned (R. 36, 39, 547).

These witnesses were J. Richard (Dixie) Davis, a disbarred lawyer, confessed felon and many-time perjurer, and his bosom friend and erstwhile client, George Weinberg, also a confessed felon, perjurer and carrier of a gun and burglar's tools. Since the early part of 1938 they had been held in jail unable to raise bails of $200,000 (later reduced to $75,000) and $150,000 respectively. In exchange for a promise from the District Attorney's assistants to recommend leniency for them on their sentences, they finally agreed to testify against "higher-ups" in the conspiracy case. They had been told they could obtain no such promise if they pleaded guilty only. Nothing was said about prosecuting them for their other crimes which they had related

to the District Attorney's assistants (Hines Appeal Record, 258 A. D. 470, pp. 1182-84, 995, 1717, 1738-39, 968-71, 974-5, 1689-90, 1099, 1005-6, 1747, 1750, 990-3, 1001).

Davis and Weinberg framed a story and testified only in the *Hines* case that they had petitioner "fixed" in the two Magistrate Court cases. Their testimony as to one of these cases was only as to alleged conversations with Hines about petitioner, their testimony as to the other case was a tale as to how they had the case "steered" to petitioner, which the minutes of the Magistrate's Court in showing what actually took place before the case reached petitioner prove was perjured. This fact was known to the State (Klein case minutes, Nov. 24, 25, 30, 1932; Removal Record, 258 A. D. 470).

When petitioner was first named, he consulted a reputable New York law firm as to how to defend his good name from the vicious assaults being made against him. They advised him not to answer them in the newspapers but that the only ethical or legal way to do so was to testify in the Hines trial. After a careful research they advised him that his two decisions were in accord with the ruling law in the Magistrates' Courts, that he should defend them vigorously as a witness and that he should ignore the false charges contained in sensational newspaper stories credited to "official sources" that the "cases were perfect" and that he had to dismiss them because "he was a protege of Hines". Petitioner was subpoenaed but there was a mistrial and he was not called to testify until the second Hines trial in February, 1939 (R. 36-37, 682-3).

The District Attorney in his summation to the Hines jury virtually admitted that his evidence as to the petitioner had fallen far short of his original sensationally publicized charge. He said:

> "• • • There is no evidence in my possession, or anybody else's so far as I know, that any of those men (Capshaw, Boland and Dodge) knew they were doing anything more than a favor for a politician to

> whom they were beholden * * * But that does not mean and I do not contend that Capshaw knew he was doing this for the 'Dutch' Schultz mob * * * All they knew is that the most powerful man they knew to whom they were beholden said, 'Do this for me' and they said, 'O. K. boss'. * * * (Hines Appeal Record, 3621, 258 App. Div. 466).

The motive for Davis framing petitioner, one of fifty New York City magistrates, was probably revealed by the District Attorney saying to the Hines jury:

"Davis did not like Capshaw, and so said." (Id. 3631.)

The District Attorney, having convicted Hines and apparently still incensed at the temerity of the petitioner in having testified in defense of his decisions, immediately announced that he was sending copies of the petitioner's testimony to the Chief Magistrate and to the Bar Association for their appropriate actions. The newspapers took up a hue and cry for petitioner's ouster.

The belated "beholden" explanation of the District Attorney was not sustained by the referee who framed and presented the charges to the Appellate Division for petitioner's removal from office. In his report to the Appellate Division he said:

> "At the time of his appointment Magistrate Capshaw was unusually well qualified by training and experience for the position to which he was appointed. He was widely and favorably known to the members of his profession, of his church and of the many social organizations of which he was a member. His reputation prior to the Hines trial among a wide circle of acquaintances was excellent." (Referee's report 4, Removal Record, 258 A. D. 470).
>
> * * * * *
>
> "In 1929 a vacancy in the City Magistrates' Court occurred upon the death of a City Magistrate living in the 13th Assembly District. Believing that under these circumstances the recommendation of the Leader of the District would be persuasive with the

Mayor, Mr. Capshaw approached Andrew B. Keating, the Leader of the District, and asked him to recommend his appointment to the Mayor. Keating told him that he understood there would not be a political appointment, that he couldn't make any recommendation and suggested that he get independent support from people who were not members of the Democratic Organization. Mr. Capshaw procured excellent letters of recommendation from several very eminent gentlemen which were written or submitted to the Mayor." (Id. 4).

The Referee also reported: "In addition to consideration of the evidence adduced at these hearings I have made inquiries of the District Attorney of this County, the Commissioner of Investigation of this City, the Chief City Magistrate and the Association of the Bar of the City of New York, to ascertain what, if any complaints have been made concerning practices or official acts of Magistrate Hulon Capshaw, and have found none worthy of consideration by this Court." (Id. 2).

The foregoing parts of the report were not reported by the press.

Although petitioner duly petitioned the Appellate Division that the same Justices should not consider the removal matter simultaneously with the Hines Record on Appeal, the same Justices (with one exception), nevertheless, did consider the two matters at the same time and handed down their decision in each matter on the same day, January 26, 1940. (Petition verified, Dec. 7, 1939, Removal Record.)

The Bar Association thereupon initiated the disbarment proceeding. The acting chairman of its grievance committee at the "hearing" announced that the committee would not consider the charges on their merits since they were the same as those passed upon by the Appellate Division in its removal decision, but would submit them without prejudice to the same court (R. 9).

The Appellate Division referred the matter to one of its Official Referees, who virtually made no findings other than that the charges were sustained (R. 686) and the

Appellate Division when considering the matter on the Referee's Report only referred to the removal opinion (258 A. D. 470) for the facts therein "stated in detail" (R. 692).

The crucial conclusions there stated are unsupported by any evidence. They are so dominated and permeated with dehors the record testimony, and additional charges of which petitioner had no notice or opportunity to defend and no opportunity to cross-examine the witnesses upon whose testimony they are solely based, that petitioner has been denied a fair trial in violation of due process of law. In thus violating well-settled New York rules of law applicable to such cases, without making any change with respect thereto as to future litigants, petitioner has been invidiously denied the equal protection of the New York laws.

Although these Federal questions were duly raised on the appeal by argument and in the brief, the Court of Appeals rendered its decision without opinion affirming the order of disbarment.

Questions Presented

The questions presented are whether the decision of the Appellate Division and the decision of the Court of Appeals affirming it without opinion constitute a denial of due process and the equal protection of the laws under the Federal Constitution to petitioner in the following respects:

1. In the Appellate Division's disbarring petitioner on testimony not in the record of either case against him but considered, without notice to him, from the record of a case to which he was not a party, wherein he had none of the rights of a party and was unable therein or at any time to cross-examine the witnesses, from which record came the only evidence to sustain the disbarment decision.

2. In the Appellate Division's finding that "the facts involved are stated in detail" in the Majority Opinion (removal action) based on "the same evidence" and its failure to find "the facts involved" on the evidence in this case, including the "additional evidence" submitted by petitioner, which was material and substantial, thereby convicting him by considering evidence not introduced in this case but from outside the record, i. e., *Hines* case (R. 692).

3. In the Appellate Division's finding that petitioner offered "no evidence" beyond his own testimony and that as to his character, showing that he was in effect and substance denied a fair hearing notwithstanding the formalities of one.

4. In the Appellate Division's finding that petitioner "was subservient to the conspirators"; Hines could have "a case disposed of favorably" in petitioner's court; in effect that he had "full knowledge" and "aided" the conspirators and "attempted to establish the innocence of Hines", and testified "to bring about the acquittal of Hines"; the petitioner was convicted of these additional charges, without any evidence to support them, which were far graver than those actually preferred, thereby denying him the sacred right of notice and hearing and the right to counsel as to these additional charges derived solely from perjured testimony (258 A. D. 470).

5. In the Appellate Division's invidiously applying retroactive rulings to petitioner's two decisions in order to surmise that he was guilty of wrongdoing in making them.

6. In the Appellate Division's indiviously violating the Circumstantial Evidence Rule in petitioner's case without changing it as to future litigants, and in likewise violating the rule against basing suspicion on suspicion (from petitioner's decisions to his testimony and from the testimony to his decisions), and in disregarding the uncontradicted testimony as to the issues.

7. In the referee's invidiously refusing to permit petitioner to testify as to the advice of his counsel that his two decisions were correctly made and that he should take the witness stand in the Hines trial and defend himself and the decisions, which testimony would have been material as to his motive and intent in testifying in the Hines trial (R. 37).

Reasons for Granting the Writ

The Federal Constitutional questions raised are of wide interest and concern to attorneys and others and have not been categorically answered by a decision of this Court. Petitioner values very greatly being a member of the bar of the State courts and of this Court and prays that he may not be deprived of either through the lack of due process in the decisions of the State courts.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari be issued in due form to the Court of Appeals of the State of New York in the above entitled matter commanding that Court to certify and send to this Court for its review and determination a full and complete transcript of the Record and all proceedings in said case, and that the order of the Court of Appeals affirming the disbarment order may be reversed by this Honorable Court and that your petitioner may have such other and further relief as to this Honorable Court may seem just and proper.

HULON CAPSHAW,
Petitioner.

CERTIFICATE

We hereby certify that we have prepared the foregoing Petition and that in our opinion it is well founded and entitled to the favorable consideration of this Court.

THOMAS I. SHERIDAN,
DEAN ALFANGE,
Attorneys for Petitioner.